ANTITRUST MODERNIZATION COMMISSION

PUBLIC HEARING

Thursday, September 29, 2005

FTC Headquarters, Room 432
600 Pennsylvania Avenue, N.W.
Washington, D.C.

The meeting convened, pursuant to notice at 9:30 a.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
W. STEPHEN CANNON, Commissioner
DENNIS W. CARLTON, Commissioner
MAKAN DELRAHIM, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
SANFORD M. LITVACK, Commissioner
JOHN H. SHENEFIELD, Commissioner
DEBRA A. VALENTINE, Commissioner
JOHN L. WARDEN, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director
and General Counsel
WILLIAM F. ADKINSON, JR., Counsel
TODD ANDERSON, Counsel
ALAN J. MEESE, Senior Advisor
HIRAM ANDREWS, Law Clerk
KRISTEN M. GORZELANY, Paralegal

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity, and each witness has been given an opportunity to clarify or correct his/her testimony.

C O N T E N T S

Hearing: Immunities and Exemptions: The State Action Doctrine

Panelists:

Maureen K. Ohlhausen
John C. Christie, Jr.
Robert M. Langer
Carlton A. Varner

P R O C E E D I N G S

CHAIRPERSON GARZA: Good morning. I'd like to welcome everybody to this morning's hearings on immunities and exemptions--the state action doctrine. I'd like to thank each of our panelists: Mr. Christie, Mr. Langer, Ms. Ohlhausen and Mr. Varner. Thank you for your testimony that you submitted in advance and for giving us your time and your thinking on this. We all look forward to this morning's hearings.

I think you may have been briefed by the staff as to how this would go, but just to be clear: what we'll do is Commissioner Yarowsky will--well, first of all, we'll ask you each to give a short statement of your positions--about five minutes apiece, if you would. And then we'll begin the Commission questioning with Commissioner Yarowsky, who will take about 20 minutes to do questioning. And after that we will turn to the other Commissioners and give them each an opportunity to ask any questions that they may have.

In the past, our hearings have been fairly

lively and informal, and we've had a lot of give-and-take, and I look forward to doing the same here.

And so I will start by asking, Ms. Ohlhausen, if you'd like to summarize your testimony for us?

MS. OHLHAUSEN: Thank you for inviting me to speak today. I'm Maureen Ohlhausen. I'm the Director of the Office of Policy Planning at the Federal Trade Commission.

The staff of the Federal Trade Commission is pleased to respond to your request for comments on the state action doctrine. But I did want to say: this statement and my responses to questions are those of the staff and do not necessarily represent the views of the Commission or any individual Commissioner.

As you know, in recent years the FTC has been examining certain state and local regulations that may restrain competition. This effort has necessarily entailed reexamination of the state action doctrine, which was first articulated by the Supreme Court in *Parker v. Brown*.

This audience is likely more familiar than most with the basics of the state action doctrine, so I'll not dwell on them. I'll simply note that *Parker* is rooted in federalism, and the Supreme Court reasoned that, in passing the Sherman Act, Congress intended to protect competition, not to limit the sovereign regulatory power of the states. The Court held, therefore, that regulatory conduct that could be attributed to the state itself is immunized from antitrust scrutiny.

This rule and its objectives--they seem clear enough at first, but they become substantially less clear when applied to delegations of state authority to private parties.

It is clear, for example, that the Sherman Act was not intended to reach the conduct of the state legislature. It is less clear, however, that it was not intended to reach, for example, the conduct of a board of professional licensure, which may be dominated by market participants with a vested financial interest in particular regulatory outcomes.

The Supreme Court provided some guidance on this issue with its 1980 opinion in *California Retail*

Liquor Dealers Ass'n v. Midcal Aluminum, Inc. And the *Midcal* case established two important limitations on the scope of state action immunity, both of which are intended to ensure that the conduct at issue is truly that of the state itself. First, the proponent of immunity must demonstrate that the conduct in question was in conformity with a clearly articulated state policy. And, second, the proponent must demonstrate that the state engaged in active supervision of the conduct.

Some courts have expanded the protection of the state action doctrine well beyond its original scope. And to address FTC concerns with over-expansion, in 2001 an FTC State Action Task Force began to reexamine the scope of the doctrine.

The Task Force was charged with making recommendations to ensure that the state action exemption remains true to its doctrinal foundation of protecting the deliberate policy choices of sovereign states, and is otherwise applied in a manner that promotes competition and enhances consumer welfare. And the Task Force Report was issued in September of 2003.

The Report concluded that since *Parker*, the scope of the state action doctrine has increased considerably. Among other possible explanations, the work of the Task Force suggests that steady erosion of existing limitations on the doctrine has been a contributing factor. Both the "clear articulation" and "active supervision" requirements have been the subject of varied and controversial interpretation, sometimes resulting in unwarranted expansions of the exemption.

With respect to "clear articulation," this trend is best exemplified by the willingness of some courts to infer a state policy of displacing competition from a legislative grant of general corporate powers. States will often empower subsidiary regulatory authorities to enter into contracts, make acquisitions, and enter into joint ventures. Although it is clear that the exercise of such powers merits no special antitrust treatment in the private sector, some courts have reached the opposite conclusion when the powers are granted through legislation. Thus, for example, some courts have concluded that exclusive contracts are the

foreseeable result of the general power to contract. Still others have concluded that the exclusion of competitors is the foreseeable result of the general power to make acquisitions.

With respect to "active supervision," the problem has been slightly different. Because of a lack of guidance as to what this factor actually requires, it has not functioned as a significant limitation on grants of immunity. In *Midcal*, for example, the Court held that a state must engage in a pointed reexamination of regulatory conduct. In *Patrick* the Court clarified that a state is required to exercise ultimate control. And, most recently, in *FTC v. Ticor Title*, the Court noted that a state must exercise independent judgment and control.

Without guidance on how to implement these various verbal formulations in terms of actual state regulatory procedures, the "active supervision" requirement has continued to have a minimal impact.

To address these problems with the state action doctrine, the Task Force recommended clarifications to bring the doctrine more closely in line with its original objectives. And these

recommendations include: (1) reaffirm a "clear articulation" standard tailored to its original purpose and goals; (2) clarify and strengthen the standards for "active supervision"; (3) clarify and rationalize the criteria for identifying the quasi-governmental entities that should be subject to active supervision; (4) encourage judicial recognition of the problems associated with overwhelming interstate spillovers; (5) clarify and strengthen the market participant exception to *Town of Hallie v. City of Eau Claire*; and (6) undertake a comprehensive effort to address emerging state action issues through the filing of amicus briefs in appellate litigation.

As you know, the Commission is not a newcomer to the state action area. And the competitive impact of state regulations has long been a focus of the Commission's antitrust enforcement agenda.

One such example of the work that we've been doing is the case the Commission filed against the South Carolina Board of Dentistry, where the complaint alleges that the Board unlawfully

restrained competition in the provision of preventive dental care by promulgating an emergency regulation that unreasonably restricted the ability of dental hygienists to deliver preventive services, including cleanings, sealants, and fluoride treatments on-site to children in South Carolina schools. The complaint also alleged that the Board's action was undertaken by self-interested industry participants with economic interests at stake. Almost all of the Board members were dentists, and the preventive care in question involves a service that both dentists and dental hygienists are trained to perform. Finally, the complaint alleges that the Board's action was contrary to state policy, and was not reasonably related to any countervailing efficiencies or other benefits sufficient to justify its harmful effects on competition.

In the response to the complaint, the Board filed a motion to dismiss on state action grounds. And the argument was ultimately rejected by the Commission, which concluded that the Board could not satisfy the "clear articulation" requirement. And that decision is currently on appeal to the Fourth

Circuit.

I'd also just like to briefly talk about our recent series of household goods movers cases, which have also raised state action issues. To date, the Commission has filed a total of six cases alleging anticompetitive conduct by movers' associations in Indiana, Minnesota, Iowa, Alabama, Mississippi, and Kentucky. The sixth, and most recent, of these--the *Kentucky Movers* case--ultimately proceeded to Part III litigation, where the Commission staff prevailed before the ALJ. On appeal to the full Commission, FTC staff again prevailed, with the case resulting in a written opinion concluding that the "active supervision" requirement simply had not been satisfied. And that case is currently on appeal to the Sixth Circuit.

In the *Kentucky Movers* case, the Association did not dispute the fact that, absent state action protection, its conduct constituted horizontal price fixing in violation of the antitrust laws. And, likewise, the Complaint Counsel did not dispute that the Association had satisfied the "clear articulation" prong. So the case focused purely on

"active supervision."

The Kentucky Association consisted of 93 competing movers, and it functions as a tariff filing agent. And under Kentucky law, every mover is required to file a tariff containing its rates and charges, either on its own or through a tariff publishing agent with the Kentucky Transportation Cabinet--the KTC. And the tariffs established rates for local moves, as well as for additional services.

Once the tariff is filed, the mover must charge the rates therein, and may only offer discounts on those rates with the approval of the KTC. Rather than assisting its members in filing their tariffs individually, however, the Association facilitated collective rate-making. So any member's proposal for a rate increase was submitted to a majority vote, establishing a collective rate binding on even those members that opposed it.

The record showed that in the 10-year period from 1992 to 2002 alone, the Association had proposed nine general rate increases, and had filed supplemental tariffs to add new categories. The KTC had nearly always approved these rate increases in

their entirety without any modification. Yet the KTC employee responsible for the evaluation of the proposed rate increases indicated that he conducted his evaluation based on his own experience, conversations with movers, and his review of various publications, such as the *Wall Street Journal*. Thus, the type of information that the KTC obtained for its evaluation was only of a general nature.

And the Commission concluded that this fell far short of satisfying the "active supervision" requirement. Although the statute that authorized the KTC to establish procedures for collective rate-making provided that the procedures must assure that respective revenues and costs of carriers are ascertained, the Commission found that the KTC had no formula or methodology for determining whether the Association's rates comply with the statutory standards, and that while in the past the KTC had performed uniform cost studies and calculated operating ratios for household goods carriers, it had not done so for over two decades. The Commission also found that the KTC did not even obtain the data, including the cost and revenue data specified in the

statute, that would enable it to assess the reasonableness of the rates.

Finally, the Commission determined that the Kentucky program lacked procedural elements such as public input, hearings, and written decisions that are often important indicators of active state supervision.

Accordingly, in a unanimous five to zero vote, the Commission affirmed the ALJ's decision on the grounds that, in light of *Midcal*, *Patrick* and *Ticor*, the KTC had not satisfied the "active supervision" requirement.

This concludes my prepared testimony, and I look forward to your questions.

CHAIRPERSON GARZA: Thank you very much. And also, I note--I just forgot to mention--that we have these little mechanisms on the table so it will go from green to yellow to red to give you a sense of where you are. I'm not likely to halt anybody in the middle of their statement, but we do want to leave time for the Commissioners. So I ask you to try to be sensitive to that.

Mr. Christie, would you like to give your

statement?

MR. CHRISTIE: Sure. Thank you very much for having me here this morning. I appreciate the chance to ventilate yet once again on one of my favorite topics: "active supervision," or the so-called "second-prong" of *Midcal*.

I began to think about this intriguing requirement for the application of state action to private actors, representing three of the five respondents in the case that came to be known as *FTC v. Ticor*, and having argued for the entire group of five before the Supreme Court seven years after the case was filed. I spent a lot of time with my co-counsel, and with my beloved adversaries, wrestling before Morton Needelman, the ALJ, in a long trial; wrestling before the full Commission; wrestling before the Third Circuit; and, finally, wrestling with nine Supreme Court Justices over what is--at least superficially--a seemingly simplistic requirement. But when it is applied to specific facts it becomes disarmingly difficult and complex and elusive--at least if it's to be applied consistent with the principles of federalism that

everybody agrees underlie the state action doctrine in the first place.

Ironically enough, *Ticor* was filed by the Commission as a McCarran-Ferguson Act case. It was filed in January of 1985, when the Commission and many others believed that "compulsion"--and only compulsion--was necessary to satisfy the first prong of the *Midcal* test. And that's where most of the attention of the bar turned after the *Midcal* test was enunciated in 1980.

Six months after the filing of *FTC v. Ticor*, Justice Powell, in *Southern Motor Carriers* taught us a different lesson about the first prong. And it was unquestionably clear in all of the 13 states originally involved in the *Ticor* case that that first prong was met, because the states in question had all permitted the title insurance rating bureaus at issue to operate. And so the state action part of the case very quickly focused on "active supervision."

I have four points to make to the Commission, which are set out in my paper, and I will endeavor to very briefly summarize them this morning.

Despite our best efforts, we neither

achieved victory nor clarification when the smoke finally cleared in 1992, and by a six to three majority the Supreme Court found an absence of active supervision.

I think everybody who's commented or thought about the *Ticor* case afterwards concedes that it has left lingering uncertainties. I summarize those lingering uncertainties as twofold. Justice Kennedy wants to see "substantial state participation." He wants to see "substantial state intervention." He wants evidence that, in fact, the rates that ultimately come to be promulgated become the state's own rates, and not something just resulting from private agreement.

What is left unsaid--and unresolved--is exactly when a state has sufficiently substantially participated. What does the state have to do once, let's say, a filing has been made, to achieve "substantial state participation?"

The other issue, I think, that's left unsettled after *Ticor* is whether Justice Kennedy's test is only a quantitative test: has the state regulator done enough? Or does it also involve some

qualitative analysis as well: has the state regulator done his job, or her job, well enough? And that also seems to me to be a lingering uncertainty, even after the Court's decision.

The lingering uncertainties are troubling to me. They are troubling as an antitrust counselor trying to advise private actors as to what they ought to do before accepting the state's regulatory invitation. It's troubling to me because, in the final analysis, the Supreme Court's test is a test of what the regulators have done, not what the private parties have done. And so private parties, however well counseled, however diligent in advance they are about trying to estimate what the regulators might do by looking at what they've done in the past, or going in to see them, in the final analysis the question is: did the regulators do whatever they were supposed to do? And this does seem to me to put private parties in very unfortunate jeopardy.

Because of that jeopardy I have no doubt--although I can't document it--that many private parties may decide they just are unwilling to accept the regulatory invitation, and that seems to

me inconsistent with--certainly--Justice Powell's notion of what the state action doctrine was all about. He construed prong one, in *Southern Motor Carriers*, so as not to interfere with the ability of the states to determine the ways in which they will regulate various industries before them.

The second point I want to make is that I don't think the drift of the law in the decade-plus after *Ticor* has created law that this Commission should worry about. Unfortunately, the cases haven't moved the body of law along very much. They haven't helped us out in terms of drawing the line in the sand. I think this is the case because, typically, they've involved a regulatory record that's all over the map in terms of its aggressive supervision or, on the other hand, regulation that just is, by almost anybody's notion, non-existent.

As a result, I don't think there's a record of outrageously bad cases to have to worry about. And that's the good news. The bad news is they're just cases that don't do anything other than say, "Yeah, that's active supervision, or "No, that's not active supervision."

The third point I want to make addresses the FTC Task Force's proposed standard practice provision. I would be the first to applaud what they were trying to do--troubled as I am about the lingering uncertainties left after *Ticor*. But I don't think that their proposed standard is consistent with the principles of federalism or sufficiently sensitive to the varieties of forms of regulation--legitimate regulation--that might occur.

And so, fourth, I'm left--because I'm not bright enough to come up with any better proposal--thinking maybe it's best just to have to grin and bear the continuing uncertainties, and let the issue continue to percolate in the courts--at least percolating in the context of full litigation records when maybe down the road the line will be more clear.

Thank you.

CHAIRPERSON GARZA: Thank you very much.

Mr. Langer?

MR. LANGER: Good morning. My name is Robert M. Langer. I'll briefly summarize some of my comments. The remainder are contained in the

materials that I previously submitted.

I really am honored to appear before the Commission today to address the state action doctrine. And I think it is relevant--just to summarize one point about my background--for over 30 years I've served at various times as a state government antitrust enforcer, as the head of antitrust for the Connecticut Attorney General's Office for two decades. At the same time I was an attorney for the state, often advising and defending state agencies against numerous challenges to state regulatory regimes alleged to have anticompetitive purpose or effect. Although I did not cite the case in the materials, there is a Second Circuit opinion--*Morgan v. Division of Liquor Control*--which upheld the constitutionality of Connecticut's liquor minimum mark-up law--pre-*Fisher v. City of Berkeley*, pre-*324 Liquor Corp. v. Duffy*--the cite is 664 F.2d 353 (2nd Cir. 1981). Ironically, right after we won the case, the legislature repealed the statute, however.

As a private practitioner now I spend a great deal of time advising clients regarding a wide array of transactions in which the immunity doctrine

applies, particularly in health care. And I have been an adjunct law professor for over 25 years, teaching both constitutional and antitrust law.

I am not going to comment, other than what I mentioned in my materials, that I had signed onto and voted for the ABA Section of Antitrust Law comments to the FTC Report. I wish to focus very briefly on the market participation exception to the state action doctrine. I hope that there would be some value to my doing so, particularly if others did not cover the topic. And I took the liberty of attaching a rather dense and turgid--

[Laughter.]

--and highly footnoted or endnoted article--I am first to admit that--as an attachment to my otherwise brief written materials.

I believe there is a serious enforcement gap in the antitrust laws, and it results from the absence of a true market-participant exception to the state action doctrine under the federal antitrust laws, and the correlative existence of a market participant exception to the dormant Commerce Clause. And the effect of this anomaly--the practical effect

--in my view, although I am not certain what empirical evidence there is to demonstrate that it is a problem, in fact, except for the few cases decided by the courts--is that states are unconstrained by both the antitrust laws and by the dormant Commerce Clause when venturing into markets themselves--not as market regulators, but as full-fledged competitors with private businesses.

While the Eleventh Amendment--and I devoted a decent amount of time in the article torturing that particular provision of the constitution--limits the ability of private actors to enforce the antitrust laws as against the states--including the whole series of cases we have had since *Seminole Tribe*--and because there is no market participant exception to the Eleventh Amendment, it is clear that the Eleventh Amendment--at least in my view--is *not* a limitation upon federal government enforcers themselves. Although the market participant exception to the state action immunity doctrine has not been unqualifiedly recognized by the courts, there is *dicta* in some cases that states it may exist, including the decision in *Omni*.

Although I recognize that as a former government enforcer that this is a politically uncomfortable issue--it would be *incumbent* upon the federal antitrust enforcement agencies to utilize their respective powers after *Garcia* overruled *Usery* to sue states and/or municipalities when those states or municipalities violate the antitrust laws as market participants.

Despite my many years of government service for the state and my articles and speeches in which I have, particularly when I was NAAG Task Force Chair in the early '90s--extolled the principles of federalism, I am convinced as a matter of national competition policy that states as market participants cannot have it both ways, and should not have it both ways. They should not be completely unconstrained by the dormant Commerce Clause and shielded from the antitrust laws under the umbrella of the state action doctrine.

With regard to the other issues I addressed in my prepared statement regarding *Ticor* and codification of the state action immunity doctrine, I will wait for questions.

I very much appreciate the opportunity to address you today. Thanks you.

CHAIRPERSON GARZA: Thank you very much.

Mr. Varner?

MR. VARNER: Good morning, and thank you very much for having me. I am quite honored to be here today.

I thought in my opening presentation I would just briefly go through the five questions that are raised by the Commissioners in their May 19th request for public comment, and give you some brief responses to them. Some I covered in my paper, some I didn't.

The first question is simply whether the courts should change or clarify the "clear articulation" requirement. I think the answer to that is clearly: yes.

I started litigating against states some 33 years ago, at a time when "compulsion"--there was no question that was the test. And then I watched "compulsion" go to "contemplated" in *City of Lafayette*, and then go to "clear articulation" in *Midcal*, and then to "foreseeability" in *Town of Hallie*, and now--in the view of some courts, I think

incorrectly--simple general authority is sufficient.

And I think it needs to be brought back to where there's a clear intent by the state to displace competition. I think where it really got lost was, in *Midcal* the Court said "clear articulation" and then it said, "and affirmatively expressed." And that has disappeared.

I would commend to the Commissioners' attention two decisions, one by the Fifth Circuit in *Hammond*, one by the Ninth Circuit in *Lancaster Community Hospital*, which I think adopt the correct rule.

The second question is about "active supervision." I don't have a lot to add to what Mr. Christie said--other than to note that I do think the *Ticor* test is--I have not seen a better alternative, let's put it that way. I'm certainly open to it. I do not think the FTC three-prong approach is either justified by *Ticor*; I don't think it's justified by the state action doctrine generally. And I certainly think if you start applying that test outside of the rate--collective rate--factual scenario, it becomes almost unworkable--for instance, if you apply it to

market participants, as has been suggested.

The third question deals with whether there should be different levels or different degrees of "clear articulation" and "active supervision." My initial reaction is, since we've never been able to agree on one level for either, how are we going to get to two?

My short response there would be--on "clear articulation"--no, I think there should be one level. On "active supervision," I do think there's merit to the FTC proposal that the degree of supervision may vary somewhat based upon the nature of the violation and the industry.

The fourth question is the spillover issue. Courts--to my knowledge, anyway--don't consider it. I, frankly, had never really seen it analyzed until the FTC Report a couple years ago. I do think courts should consider it, at least as a factor. One of the principles upon which state action immunity is based is that the voters can throw out people if they adopt actions that are anticompetitive--although in my own experience, that seldom comes up. And that's obviously gone when the costs of the anticompetitive

activity are borne by people outside of the state.

The fifth question deals with how the courts should apply the state action doctrine to various government entities, and it's basically a series of questions. I'll try to kind of group them together.

On hybrids and quasi-government entities, I basically support--I think it's the Areeda-Hovenkamp approach which, if a majority of the governing board are market participants--with lawyers regulating lawyers, or accountants regulating accountants, then I do think there should be some sort of active supervision.

I think the real question is the one you have here second, which is: if so, who should actively supervise these state entities? And I don't have a ready answer for that. The FTC Report suggests that it should be a government entity outside the entity in question--which certainly makes sense. But I think that's a real issue we can save for later if you want to talk about it.

As to market participants, I think Mr. Langer does make a very eloquent argument as to why that exception should be permitted. And it does have

some appeal. I would point out, however, that there are a number of court decisions--primarily *Pretown* and *Pallade*--which construe activities that we would normally think as falling within that exception, as actually being traditional government activities. And there are also some other issues there--but I see the red light is on, and I will stop.

Thank you.

CHAIRPERSON GARZA: Thank you very much.

Commissioner Yarowsky?

COMMISSIONER YAROWSKY: Thank you. Your testimony was excellent. I want to also congratulate the staff--what a great panel to cover this waterfront.

You know, this area, for me, has always been very intellectually challenging, but very, very trying. And I guess in trying to think about it myself, it's because all of us are trying to reconcile large concepts. But that can be a conceptual or abstract project, but then we're held back from doing it because we have to give some respect to the diversity of factual situations so we don't intrude on state sovereignty. It's an

interesting, delicate dynamic.

So we all want closure, but those are the forces.

You know, my first experience with this was when I left a large Washington firm and went to the House Judiciary Committee, and suddenly the first bill before me was the Local Government Antitrust Act. And there was a Senator from South Carolina--Senator Thurmond, who was well stage-managed by a staff person--I think named W. Stephen Cannon--

[Laughter.]

--and what happened in that deliberation--on both sides of the Hill--was an attempt at an inquiry to look at state action then. *Midcal* had occurred just a few years before. There was a problem with local governments, but we were looking at state action--the Members were looking at state action. And you know what happened. You described a little bit of it, Mr. Varner--basically, they just threw out the state action analysis that had been there, developing, evolving, since 1943, and came up with their own scheme for that bill, both remedial and substantive.

That was the first indication that this is a very difficult problem. And yet, I think we have to put it in perspective.

Parker v. Brown is not a biblical pronouncement. As I think Mr. Langer said in his testimony, it's basically a rule of construction--not to minimize anything. *Midcal* is basically an operational rule to help the rule of construction be applied.

Well, if you look at that, in that light, then I think you may be able to jump back and try to see--where do we need to go?

There's three areas I would love to cover with you today.

One is to look a little bit at the evolution--within a certain time frame that we have to talk about this.

Second, let's move away from that and jump outside the box, and see if there's ways to re-think this outside how the courts have dealt with it. There are certain suggestions in your testimony and others'.

And, finally, I think this all occurs

against changing other large concepts--the Tenth Amendment. There's a fading notion of "domestic commerce." You see it all around you. And to the extent that we freeze-frame 1943, and all the assumptions that prevailed then--I supposed to now, 60 years later--that may be a mistake. And it may hinder our ability to maybe think through something that may have some value.

So--having said those things, Mr. Christie, it has been 60 years of development. And I do understand, because you're very sensitive to the nuances. In your statement you don't distort where we are. You never overstate where we are at all.

And yet, if we don't try to do a codification--I'm not saying Congress passes it, but try to at least restructure the scheme--won't we be doing this in 20 or 30 years as well? I mean, we've lurched from *Parker* to *Midcal* to *Ticor*, and we're still in a state of confusion.

I'm really going to your last sentence--not to criticize it, but just, I need you to explain why we should keep going in that mode.

MR. CHRISTIE: Well, I guess my first answer

to your question is, "perhaps." [Laughter.] But being somewhat more expansive, we don't know where the body of case law will take us. It's entirely possible that yesterday somebody filed a hard case; the case where the regulators did some things, but they didn't do all things. That's the kind of hard case we thought *Ticor* was. The Supreme Court characterized the record much different--as a record that demonstrated that regulators only checked mathematical accuracy.

If those hard cases are filed and do develop, it could be much more quickly than has been the case looking backwards to 1990--what's happened since 1992--that the line that I urged be drawn, or am hopeful someday will be drawn or might be drawn.

The problem I have--just to try to restate it somewhat differently--in trying to redraw it on the quick, abstractly--is that I find it very difficult to embrace, in the abstract, a concept of "active supervision" that I'm comfortable leaves potential regulatory activity that's genuine and participatory in, and all that's un-genuine and un-participatory out. Once you start to articulate

something, there is, it seems to me, a real risk that you're not as inclusive as you want to be, or maybe you're overly inclusive.

And I think the efforts, including the Task Force's laudable efforts to get at this--as a result start descending down into easy signs--"easy," which are procedural things, which may or may not indicate that active supervision is really going on; or judgmental standards that I do think trespass on this federalism issue that, as you suggest, lies behind the whole problem in the first place.

COMMISSIONER YAROWSKY: Sir, you had been an advocate of thinking strongly about a codification.

MR. LANGER: Well, I tried to be as equivocal as I could in my materials; that is, I wanted to identify that at least one state had gone down the path of codification. At the state level it presents a problem, because the General Assembly froze the law at the time when we thought that the requirement for the first prong was "compulsion," rather than "clear articulation and affirmative expression." And now we have a real problem--particularly with the reaffirmation of Connecticut's

statute through the *Miller's Pond* case that I alluded to in the materials.

But at the federal level, I think you can easily codify the first prong. John does raise a very good point--can you deal with all of the aspects of "active supervision" and codify that prong?

It seems to me we will have to develop a new body of common law, but it will be narrower than the body of common law we have now. And that is not unusual. That is what we do with statutes all the time.

So I am not troubled by that. And when I was writing my statement I was thinking that codification is something that needs to be considered. Could I fully embrace it? The answer is, I do not know enough to know that.

I do not think there is a manageability problem as to the first prong at all. And that may actually help, because it would narrow the universe of what we need to work on with respect to second prong, if we go in that direction.

And I do think that it would tend to eliminate, or at least ameliorate, the problem of

having different standards at the federal and state level, because most state antitrust acts--not all of them but most of them--seek guidance from federal law. There are some material differences in some states, as I am sure all of you know. But to the extent that we had a federal doctrine for immunity, I think it would be quite helpful.

COMMISSIONER YAROWSKY: But would there be a Tenth Amendment issue if Congress directed states on some of their core decisions on how to proceed?

MR. LANGER: After *Garcia* I am not sure that there is. When *Usery* was the law, then the answer was, maybe we need to amend the Constitution, or leave it as it is. I am not sure, after *Garcia*, that is actually a problem any longer.

COMMISSIONER YAROWSKY: Ms. Ohlhausen--please answer that question, as well. But, a number of the witnesses have at least questioned some of the criteria that were set out in terms of the division.

For one thing, I think I'd like to comment both Tim Muris and Debbie Majoras and the staff for keeping your focus on this issue. I think that's terrific.

The testimony kind of keyed in on the third component. And the criticism was--and the ABA joined into that--that it kind of was an exclusively procedural focus; it was kind of rigidly focused on that.

How would you respond to that? And the suggestion that the ABA gave kind of, in turn?

I wondered how, Ms. Ohlhausen would respond to some of the criticism in the testimony to the third component of the FTC Task Force Report? I thought there were a lot of challenges by focusing simply on the procedural aspects. Well, and then some supporting. I just want to be sure if you understood me. I think--do you understand the focus?

MS. OHLHAUSEN: So your question is: our response to the criticisms that the FTC test proposed in the FTC Task Force Report is too stuck on procedural and not on the substantive issues.

COMMISSIONER YAROWSKY: Right.

MS. OHLHAUSEN: Well, what I would say is that *Ticor* mentions that we're not there to be judging the wisdom of the underlying regulation--just to be sure that this is really the action of the

state, and they put their imprimatur on it.

So, in some ways, a procedural test is at least a good indication that the state itself has been actively involved in this--obviously "active supervision."

Now, the third prong does mention a specific assessment, both qualitative and quantitative, of how private action comports with the substantive standards established by the state legislature. So I think maybe that gets a little bit more towards--is it actually in the spirit of what the state legislation was doing--not that somebody went through these sort of formalistic rules. I think a lot of the guidance, and the idea of creating an evidentiary record that the state has been involved in this, and that they've really been paying attention, and that they're paying attention to it, falls, kind of naturally, under some procedural sort of guideposts.

COMMISSIONER YAROWSKY: So that if there was a periodic review--I mean, that's another suggestion, that there be a periodic review to be sure that there was concordance between the original--

MS. OHLHAUSEN: Yeah--I have a little

question about the periodic review, just every two years kind of giving just a general blessing on, you know, "Okay, this is how you do it," since *Ticor* and *Patrick* suggest officials must review particular anticompetitive acts of private parties--and not just the general regulatory scheme.

So I would be concerned that a review every few years wouldn't really get into--is this act--is this rate that's being proposed really the state's intention, the state's act?

COMMISSIONER YAROWSKY: Okay. I'd love you to jump in, Mr. Varner--but, also, if you could direct your attention also to the Local Government Antitrust Act, if you could comment about it.

MR. VARNER: Yes.

Are you going back to your original question about codification?

COMMISSIONER YAROWSKY: Yes.

MR. VARNER: I go back and forth on codification, generally. Number one, there have been a number of situations--of which you're all very well aware--where Congress has passed a statute, and the statute creates as many problems as the case law did.

And, number two, when they did move into this area on the Local Government Act, in my view, there were some mistakes there. And I'll go into those in a moment.

I do want to briefly mention, though, I think codification on certain precise issues, such as perhaps a market participant exception, might be possible. Okay?

Now, with respect to the Local Government Act, I just want to comment--we've had that now for 21 years. It's not an immunity; it's just a damage bar. But it applies to any local government--"local government" is defined very broadly; any official or employees of local government, any official action. And the courts have defined that very broadly. And then, also, that official action can also get the damage bar to private parties.

And I had never felt--not necessarily in this area but other areas, as well--that an injunction alone is much of a deterrent. There was a study by a law professor, also, that showed out of 116 cases litigated under the Local Government Act from 1984 until 2000--out of 116 cases, an injunction

was granted only twice. Which also shows that this "official action"--the construction of it--is extremely broad.

So I question whether the statute itself--because I think when Congress passed it they did intend the antitrust laws to continue to apply to local governments. And I question whether that's really been happening.

I also question whether the other limitations we talk about on state action, such as strengthened "clear articulation" requirements if you spill over, or active supervision, will have much impact. Let's say we make all those changes, and we just leave the Local Government Act on the books as it is, it covers most of the entities that would be subject to that "clear articulation" requirement. And it covers the market participants.

So, while I recognize it's probably very well established, from a political standpoint it may not be feasible. In my view it does create a big gap. And when we talk about strengthening these other requirements, and we just don't talk about the Local Government Antitrust Act at all. I think we

need to consider the relationship between the two a little more.

COMMISSIONER YAROWSKY: You know, most of this discussion, understandably, is conceptual--we have these concepts. If we look at it at an empirical level, private parties really are the pawn in this game. They also have to figure out what to do. They are the regulated entity. They are dutifully following what's going on, not knowing if the infrastructure is well created.

I know Mr. Langer suggested one possibility of some kind of remedial relief for folks that are following--private entities following the regulatory structure as it's given to them.

Do you think that may be a valid issue? I'm curious what others think about how to deal with the private parties?

MR. LANGER: I thought it was just fundamentally unfair that in particular circumstances where you have no choice as an entity but to accede to the wishes of the government as a condition of doing business. It is a situation where it is truly the government falling asleep at the switch and not

doing its job--although I do not have any evidence that there have actually been damage actions brought. You may know it--

MR. CHRISTIE: I can provide that evidence--if you need it, in spades.

[Laughter.]

COMMISSIONER YAROWSKY: I think that would be helpful.

MR. CHRISTIE: But I did also--responding to your point, Jon--I would mention before we all began here--in fact, in the early days of *FTC v. Ticor*, legislation was introduced in Congress which specifically was designed to exempt private parties, basically following the regulatory scheme set up by states, from treble-damage actions. It had a very--shall we say?--upbeat title. I think it was called the Antitrust Improvements Act of 1985.

I'd love to have had brother Langer's support for this legislation, but I doubt that I would have gotten it at the time. As best as I can recollect, it never got out of committee. But it was designed to deal with this difficult unfairness that you're speaking to.

COMMISSIONER YAROWSKY: Well, especially with doctrinal confusion, it's certainly an issue that's not going to go away.

What if Congress--and we're again going back to Congress. They're limited by the Constitution. But that's a slight limitation.

What if Congress would start legislating like it did a year or so after *Parker*, as it did for the insurance industry--simply begin to define "domestic commerce." Not let the facts define that; just define "domestic commerce" for that industry.

What if they start defining it for other sectors, other industries, so that, in a sense, you start competing with the jurisprudence of state action because of subsequent Congressional enactments? Do you think that other provisions of the antitrust laws like McCarran-Ferguson--if one would try to codify a framework for state action--should that be rolled into that same effort? Since it's out there, and goes contrary to what we've been talking about?

COMMISSIONER VALENTINE: Jon, can you explain just what you mean by "domestic commerce" as

opposed to "local" or--

COMMISSIONER YAROWSKY: What I mean is that McCarran is predicated on that the business of insurance is not interstate commerce.

COMMISSIONER VALENTINE: On interstate--

COMMISSIONER YAROWSKY: On interstate commerce--that's all. So I'm just calling it "domestic" because that was the reference that the Court--the idiom of *Parker v. Brown*. They called it "domestic commerce."

MR. CHRISTIE: I don't know that I have any specific answer to your precise question. It has always been intriguing to me. As I mentioned to you, *FTC v. Ticor* was originally filed as a McCarran-Ferguson Act case, testing the *Royal Drug/Pireno* concept of what is or is not the "business of insurance." It's always been intriguing to me that the second aspect of the McCarran-Ferguson Act test--namely that the activity be "regulated by state law" --has followed a totally different line of development than has the concept in the context of state action.

It's well established under McCarran-

Ferguson law that you have "regulation by state law" if you have legislation on the books--just legislation--that either prohibits or allows whatever the challenged anticompetitive conduct is.

COMMISSIONER YAROWSKY: My time is up. I'm going to sign off.

Just--if, in the course of your other answers, you might think about the issue of a state going into a market--a mature market, not a market where they were in a long, long time, for public safety, health, welfare--traditional notions of state regulation--but a very mature market, with a lot of private sector players--telecommunications, or others--and whether the analysis, if you enter a mature market, already well populated, should be different than if it enters--kind of establishes the market from the beginning, and how that analysis might flow.

But we're up--we're at 20 minutes. So I'll pass the mike.

CHAIRPERSON GARZA: Okay.

Commissioner Valentine?

COMMISSIONER VALENTINE: Tell me how many

minutes I have.

CHAIRPERSON GARZA: Roughly five.

COMMISSIONER VALENTINE: I am not nearly as smart as our prior Commissioner. I'm not going to worry about concepts, I'm going to get right down into what we might be able to do.

I think, practically, here--and I appreciate and understand and am respectful of some of the Constitutional limitations on what we can do.

Let's start with interstate spillovers. Could Congress constitutionally--I supposed based on its interstate commerce powers--say that whenever the state's effort to exempt action impacts other states more than 50 percent of the time, that there would be no state action immunity?

Why don't we have Mr. Langer and Mr. Varner answer that?

MR. LANGER: I could answer it with a question: Could Congress amend the antitrust laws, and use its preemption power to prohibit states from acting anticompetitively? Would that present a problem under the Tenth Amendment?

I think the answer is that Congress has

plenary power, between the Supremacy Clause and its Commerce Clause power to do that if it chose to do so.

COMMISSIONER VALENTINE: Mr. Varner?

MR. VARNER: Yes--and I think the 50 percent test is a fairly reasonable one. It's one I've kind of mulled over.

I think the spillover needs to be at a substantial level, and probably 50 percent is reasonable. Constitutionally, I think the answer is yes also, because you've clearly got interstate commerce, and it strikes me that the Commerce Clause would probably trump the Tenth Amendment at that point. But that's just my reaction.

COMMISSIONER VALENTINE: And, Ms. Ohlhausen, would the FTC staff find that a useful concept, to think about excepting from the exemption conduct that has more than a 50 percent on interstate, as opposed to intrastate commerce?

MS. OHLHAUSEN: I think so. In the report we called it an "overwhelming" impact. But certainly, a very substantial impact is above 50 percent.

COMMISSIONER VALENTINE: Okay. Now I'd like to go down the panel and ask, with respect to the marketplace participant exception, who would recommend what? Would you recommend it--and how would you phrase it? And exemption--outside of immunity, whatever the exception from the exemption, or however you want to phrase it--outside of antitrust immunity, whenever the state is acting as a marketplace participant or something more along the Areeda-Hovenkamp lines, whenever the state is acting at a horizontal level in a position that would or could be competing with the other market participants but, in fact, is colluding with them?

Let's go down the line: Christie, Langer, towards Varner.

MR. CHRISTIE: I don't think I have any comment.

COMMISSIONER VALENTINE: Okay. Mr. Langer.

MR. LANGER: I am trying to think how I could answer your question in less than 30 minutes.

COMMISSIONER VALENTINE: Do you want me to go on and come back to you?

MR. LANGER: No, no.

Would you repeat the question, because I want to make sure I get it right?

COMMISSIONER VALENTINE: I want to focus on how--if one should, and if one did, then how one should create an exception, outside of the immunity, for marketplace participant activity of the state.

MR. LANGER: Okay.

COMMISSIONER VALENTINE: And should that be limited to the Areeda-Hovenkamp concept of only when the state is acting sort of horizontally vis-à-vis other market participants.

So, one way it was phrased was "in collusion with" the actors, and another time they just say "in competition with."

MR. LANGER: Consistent with what I said before, and what I have written about--to the extent that we have a market-participant exception to the dormant Commerce Clause and states are thus unconstrained by the Commerce Clause, then the *quid pro quo* is that the states should not have antitrust immunity. That does not mean that states would necessarily violate the antitrust laws. It just means states would be subject to the antitrust laws,

and it should not be limited by the Areeda-Hovenkamp horizontal collusion caveat or codicil.

COMMISSIONER VALENTINE: Mr. Varner?

MR. VARNER: I would prefer the first, in which you have a market-participant exception--although I think there are real interpretation issues, but I'll skip by those.

The Areeda-Hovenkamp approach is--it sounds reasonable in terms of concept, but I don't think it would really have much of an impact.

My experience is that the primary impact of competitive activities of market participants are things like exclusive contracts in kind--not collusion--similar to those which existed in *City of Lafayette* and a lot of the cases. And that, as a result of that, the private competitors are disadvantaged, and consumers pay higher prices. That's basically a lot of local monopolies.

I would also add that I think you should put a market-participant exception into the Local Government Act.

COMMISSIONER VALENTINE: Can I ask one more question? My time is up.

CHAIRPERSON GARZA: Sure.

COMMISSIONER VALENTINE: On LGAA--on Local Government Antitrust Act--how many of you would recommend single damages for the government actor as well as for the private parties that followed it, in terms of possibly both--it's unfair to penalize private parties alone and protect the government. And if you penalize the private parties, they might well have an incentive to make sure that the government's doing what it needs to do.

MR. VARNER: I favor the single-damage approach. I think that was in my--

COMMISSIONER VALENTINE: For both government and private?

MR. VARNER: Yes.

COMMISSIONER VALENTINE: I'll get to you last, Maureen.

Mr. Langer?

MR. LANGER: Sounds right, subject to my further thought on this. I had not really actually thought that issue out, but it sounds right to me.

COMMISSIONER VALENTINE: You're welcome to come back to me on that, too.

Mr. Christie?

MR. CHRISTIE: Well, I guess if I had my divvies, I'd be instinctively more sympathetic for some kind of way to help the private actor out of what I perceive to be an extremely precarious position--trying to, on the one hand, subscribe to what the regulators are hoping they will do, and on the other hand having to worry about damage exposure, whether it's single damages or treble damages.

COMMISSIONER VALENTINE: How about singles for the government, and nothing for the privates.

MR. CHRISTIE: Well, that's better from my point of view.

But, as I said earlier, it has been tried, and the legislative record so far doesn't suggest a lot of enthusiasm.

COMMISSIONER VALENTINE: Ms. Ohlhausen, what do you think--how would the FTC staff come out here?

MS. OHLHAUSEN: Well, we didn't say anything in the Report on that issue. So this is really speaking just for me.

COMMISSIONER VALENTINE: Okay. Fair.

MS. OHLHAUSEN: I think that single damages

for the private parties would make sense in that they were not entitled to get these profits, or whatever, under the antitrust laws. So, to return them would seem to just sort of put things back at an even basis.

COMMISSIONER VALENTINE: Okay. Thank you.

CHAIRPERSON GARZA: Thank you.

Commissioner Shenefield?

COMMISSIONER SHENEFIELD: First let me thank the panel for what I thought was terrific written submissions. I know they were thoughtful, and certainly helpful to me.

Confining my attention just to the "active supervision" prong--just to that question--I'd like each member of the panel to tell us what, if anything--ranging from nothing through an authoritative statement of the best practice, or best statement of the law, to statute--do you recommend this Commission do?

And may I start, John, with you?

MR. CHRISTIE: Well, John, I guess I don't want to be guilty of inconsistency here--however tempting your question might be.

I find it difficult, as I've said, to comprehend--I guess I'm just not smart enough--an "active supervision" standard that I'm reasonably satisfied will comport with *Ticor*, comport with the principles of federalism, and be sufficiently realistic to embrace the enormous variety of forms of state regulation.

And so I'm left waiting for the law to develop further.

COMMISSIONER SHENEFIELD: So you would say "nothing"--do nothing.

MR. CHRISTIE: Yes.

COMMISSIONER SHENEFIELD: Forget *Ticor* for a moment. Just assume that you had won.

MR. CHRISTIE: Oh, that's a great assumption!

[Laughter.]

COMMISSIONER SHENEFIELD: What then--if you throw that out of the equation, do you have an answer that you would like to recommend?

MR. CHRISTIE: No, I don't think so. Assuming that the *Midcal* test remains good law, and the law demands some indicia that the regulators have

been on the beat, I don't think even if you took *Ticor* out of the equation that I would have any better substitute to suggest.

Frankly, I thought the First and Third Circuits' "basic level of activity" idea was pretty good, because I think, on the one hand it did require more than just that a system be in place, and on the other hand, it avoided the kind of slippery slope that I think you get into once you start to review, or try the regulators--review their activity or second-guess the job they did.

COMMISSIONER SHENEFIELD: Okay.

Mr. Langer?

MR. LANGER: I addressed the issue earlier. I think you could consider codification, but at least regarding the "active supervision" prong, it still would require the development of a considerable body of common law, because it is so fact-specific. But you could codify both prongs that would make it clear that "active supervision" would be consistent with the *Ticor* requirement of pointed reexamination, that is, supervision would not just be a blink and a nod.

COMMISSIONER SHENEFIELD: If codification

weren't an option, and you were sitting on the Supreme Court, what would your rule be for the "active supervision" prong?

MR. LANGER: Where we are, in terms of *Ticor*, is fine--subject to my comments about the unfairness regarding private entities; the comments I made previously.

COMMISSIONER SHENEFIELD: Okay.

Ms. Ohlhausen?

MS. OHLHAUSEN: I think--

COMMISSIONER SHENEFIELD: Speaking personally.

MS. OHLHAUSEN: Yes, speaking personally.

I think there's a benefit to having clear rules. One of the things Mr. Christie mentioned was this uncertainty, maybe it's deterring some people from participating in state regulatory programs when it would be beneficial for them to do so.

So to have something set out more clearly would help reduce those problems. And also being sensitive to the idea that there's a variety of state regulations.

The FTC's elements are--we certainly

think--a good idea. I don't know if--and this is definitely speaking for me, personally--but it would be possible to create a safe-harbor kind of thing where, if you meet all these, you're definitely okay, but if you have some other more unique situation, that will be determined more on a case-by-case basis.

COMMISSIONER SHENEFIELD: Okay.

Mr. Varner?

MR. VARNER: I think it would be very difficult to codify an "active supervision" requirement. I've occasionally tried to write some words. I have never gotten much father than some general statements like, "substantive review," and I never used "pointed reexamination."

But the standard I think you'd codify would probably--as I think Mr. Langer mentioned--engender just as much confusion as the existing standard. I do think, as I mentioned before, that based on the alternatives, that the *Ticor* standard is the best I've seen.

I'd also refer to something Mr. Christie said which I think is an important point, is that if you have a very strong "clear articulation"

requirement in some cases--perhaps not in collective rate-making, but in some cases--in my view that moots the need for "active supervision."

COMMISSIONER SHENEFIELD: Okay. So it seems to be: one vote for codification, one vote for "maybe codification," and two votes to do nothing--is the way I total it up.

Thank you, Madam Chairman.

CHAIRPERSON GARZA: Okay--Commissioner Litvack?

COMMISSIONER LITVACK: Thank you.

I'm going to sort of pick up where Commissioner Shenefield left off. This is not an area in which I have any real personal experience--nor have I spent much time--spent any time--thinking about it, prior to receiving your submissions and hearing you.

And so what I'm next going to say by way of a question is a statement and a question--and it's born, in good part, out of ignorance, except just listening to you, I get a feeling.

And the feeling I get is: nobody really thinks that codification is the answer, because Mr.

Langer says that after you codify it you're still going to have to deal with interpretation. That's correct.

Mr. Varner says: I've tried to codify. I can't.

So, my question to you all is: why isn't it right for this Commission--which, among other things, may recommend legislation, et cetera--to look at this and say to itself: this "active supervision" is sort of like pornography. You're going to have to know it when you see it. No one's going to write it down.

So if that's the case, then what's the best you can do? And it seems to me the best you can do--because I'm very sympathetic to Mr. Christie's point--is don't accept the 1985 defeat on legislation that says there shouldn't be damages to these people, and that maybe the most sensible thing to do is accept the standard--you're not going to articulate it any better--and recommend, or push for, or try to get legislation which recognizes the problem for the participants, while at the same time respecting the development of the law through the common law system.

What's wrong with that, John?

MR. CHRISTIE: I can't think that anything's wrong with it, Sandy. I thought at the time that it was an equitable solution to a very difficult problem. And I still think the same. My position hasn't changed. I've recognized some practical issues in getting there, because the concept of treble damages is so well embedded, it seemed, in the psyche of so many.

COMMISSIONER LITVACK: And a lot of times on this Commission.

MR. CHRISTIE: [Laughs.] But I do think that Justice O'Connor had it right when she focused on this uncertainty and said: look, you can have people who, in two different states, do exactly the same thing in terms of all that they do to get the regulatory system going. And you can have, in one state, a total immunity, and in the other state, treble-damage liability--simply because of differences in what the state actors have done. And that's the problem.

COMMISSIONER LITVACK: Mr. Langer?

MR. LANGER: By the way, that is also true with regard to community standards for obscenity--

going back to the point you were making.

[Laughter.]

COMMISSIONER LITVACK: Absolutely.

MR. LANGER: I point that out to my students all the time.

COMMISSIONER LITVACK: Absolutely.

MR. LANGER: And I addressed this before--that is why I was so equivocal about codification--at least on the second prong--for exactly the reason that it may just engender significant additional interpretation, and maybe we just leave it where it is.

I do not think it is quite as difficult to accomplish on the first prong, though.

COMMISSIONER LITVACK: Would you favor eliminating the damage element for the actors who acted in good faith pursuant to state regulation?

MR. LANGER: Yes. Right.

COMMISSIONER LITVACK: Yes, you would.

Is it totally unfair to ask you that?

MS. OHLHAUSEN: Well, it's certainly not anything the report covers.

COMMISSIONER LITVACK: What's your personal

view?

MS. OHLHAUSEN: Well, my personal view is--as a person who's in charge of the FTC's advocacy program, we actually review a lot of state legislation that's likely anticompetitive and is being pushed by private parties, I have a little less sympathy for the "totally innocent" private party. I mean, sometimes it may be the case, but often it's not.

So that would just play into my thinking.

COMMISSIONER LITVACK: "Totally innocent," meaning that they were affirmative actors in getting the state to promulgate whatever it did in the first instance.

MS. OHLHAUSEN: Yes. Yes.

COMMISSIONER LITVACK: Well, they probably were. They probably were.

But--the state did it. They acted in accordance with it. Don't you think it's fair not to hold them to a damage standard?

MS. OHLHAUSEN: Well, one of the things that I am concerned about is, as you make things easier, you certainly make it less costly for people to try

to get anticompetitive state regulations passed.

COMMISSIONER LITVACK: Sure.

Mr. Varner?

MR. VARNER: Yes--I think you said it very well, and I agree--that so long as it's accompanied by an amendment imposing single damages under the Local Government Act, I think it's a good idea.

COMMISSIONER LITVACK: Madam Chair, thank you. I'll cede my remaining 28 seconds.

[Laughter.]

CHAIRPERSON GARZA: Very good. Thank you.

Commissioner Kempf.

COMMISSIONER KEMPF: If Sandy hasn't spent any time thinking about this, I've spent even less. So--I appreciate the thoughtfulness that went into your written presentations and your remarks today.

I find the area troubling, in the sense that, just as at the federal level, the most effective way to fix prices in America is to get somebody to bless it. And as I look at most of these things--whether it's movers, or dentists--it just strikes me as blatant price-fixing.

And the efforts--and I suppose I commend

them--of the Commission and others to say: we don't like this to start with, and so you have to jump through all the hoops, and we'll tinker with the hoops as much as we can to get rid of it.

And as I listened to you I was thinking that there ought to be a third prong--if I were king of the world, and respectful of federalism--which would be, in addition to having a clear articulation that we as a state want to do this, and secondly having active supervision, it would go to the reasons we want to do this. And it would be a thing that says it just can't be to subvert the federal antitrust laws, and to escape competition.

That's sort of a comment.

I only really have one question, and I get pieces of it from various people--most clearly, I suppose, from you, John. And that is: what do you think we as a Commission should do in terms of action we should take in this area? And I gather, John, to summarize your overview is: "As screwed up and difficult as it may be, I can't think of anything better than letting the courts continue to wrestle with it, so don't do anything."

MR. CHRISTIE: That's right, Don--at least if your focus is on trying to address this elusive "active supervision" prong itself. Sandy had suggested--and others--the possibility of dealing with it with a different focus, namely looking at the equities involved and deciding that you're going to relieve private actors proceeding in good faith to comply with state regulation from damage liability, whether it be completely, or limited to single damages.

But--yes, you read me right. If the Commission is just focused on whether we should do anything by way of a recommendation with respect to the second *Midcal* prong, my recommendation would be no.

COMMISSIONER KEMPF: But just to pick up on their complying with state regulation, I think most of the time they are the creators of the state regulation. In other words, it's not the state--it's not a bunch of legislators sitting around saying, "You know, we should have price-fixing among different groups." It's the interest group that goes to the legislature and seeks regulation so that they

can price fix. And whether it's the federal or state level, that's usually the way it comes about. They decide that it would be swell if they could fix prices, and therefore let's get a federal agency to let us do it, or let's get a state legislature to create something. And then the only place they get in trouble--as I see--is if they don't do a good job of it.

MR. CHRISTIE: Well, I've spoken with a lot of state regulators who I think would take strong issue with on that, Don. First of all, state regulation of different industries deals with a lot of industry issues. It doesn't just deal with rate bureaus, or rate filings, it deals with all kinds of things. And I think the regulators will say, we have a legitimate interest--take the insurance industry--we have a legitimate interest in making sure that insurance carriers doing business in our state survive so they'll be around to make good on policies if some catastrophe should occur.

And included in their interest in making sure that their rates are adequate to support these companies when those claims come to be filed is, I

think, a legitimate interest in how the rates are filed, and what the system is for regulating those rates.

You're coming at it from an antitrust lawyer's perspective and focused just on these antitrust issues that have been before us today. But you can't overlook what's going on in the larger context from the state's point of view.

COMMISSIONER KEMPF: Just quickly, if the others could comment on what, if anything, you want us to do.

MR. LANGER: The issue about what happens if someone has some malevolent intent, or some clearly anticompetitive intent, runs smack dab into the *Noerr-Pennington* doctrine and that is based on the right to petition for redress of grievances under the First Amendment. Corporations of course have First Amendment rights. Thus, you have to deal with it on the back end; that is, was it done properly, not whether the petitioning had some good or bad motive--unless there is bribery, kickbacks--the type of stuff that is mentioned in *Omni*. That would be a different issue.

MS. OHLHAUSEN: I think that the FTC staff's view in the report is that it would be beneficial to clarify what's required to really show--to bring it back to the first principles of the state action doctrine to show that this is a conscious decision of the state to displace competition with regulation.

COMMISSIONER KEMPF: But you would permit them to do that, I gather, if they said, "Yes, we want to do this because we're afraid of ruinous competition in the x industry, and we like price-fixing therefore."

MS. OHLHAUSEN: Yes, I mean part of this is to assign political responsibility. And so if they're stepping up and saying, "Yeah, we're doing this, and here's our reasons, and we're going to make sure that the board is doing what we want," then I think that is protected. When it's obscuring responsibility, that creates a problem under the doctrine.

MR. VARNER: Well, I'd recommend three things. Number one, recommending that the courts strengthen the "clear articulation" element. And I'm saying that just in terms of recommendation as

opposed to codification.

But the reason I think it's important is I do think there's been a discernible trend in the last couple years since the FTC Report came out that courts are looking more carefully at "clear articulation." And I think that if this Commission said something on that issue, that would be helpful also.

Number two, I think--as I've expressed--you should amend or repeal the Local Government Act.

And, number three, possible codification of a market-participant exception.

COMMISSIONER KEMPF: Thank you.

CHAIRPERSON GARZA: All right--Commissioner Delrahim?

COMMISSIONER DELRAHIM: Thank you.

Let me just draw on a couple of other areas where I think we could learn something from as we do our work. And I'm looking at some of the criminal drug laws and the recent Supreme Court decision in the medical marijuana case that went up, dealing with the Commerce Clause.

You can violate--you can be fully sanctioned

in a state, or be allowed to do certain activities but still violate the Federal Controlled Substances Act. The Supreme Court said it's constitutional, perfectly within Congress's power to do such a thing. And also drawing and learning a little bit from the European Union, where the movement of goods in a common market principle is such an important part of what they do, they do not allow any state, any country, to discriminate in the movement of interstate commerce.

Is there any benefit--let's put aside the apportionment of political responsibility and other views of federalism--is there any benefit to have the state action immunity to the public, to the economy--to start with? Do we even need it?

And let's start with that and see where it can go from there in the next four minutes that we have.

Mr. Varner?

MR. VARNER: You raise what I think is kind of the $64,000 question, because when you actually go back to the *Parker* decision of 1943, it's clearly based on a concept of federalism that's unique to our

Constitution. And so if you take the federalism justification out, that removes the justification for the doctrine.

Likewise, it occurred at a time--and a number of commentators have pointed this out--at a time when there was kind of a feeling in the United States to support programs like that agricultural raise and price-fixing program that existed at that time. That was kind of part of the New Deal mentality.

And so, basically, if you're going to remove the federalism prong, and you're going to just look at it fresh, without that, obviously it's an antitrust immunity, generally pro-competition, and there's not much of a justification for the doctrine--would be my view.

COMMISSIONER DELRAHIM: Before we get to Ms. Ohlhausen--Mr. Christie?

MR. CHRISTIE: Well, it's an interesting question. It's one I haven't give as much thought to as some other aspects of the doctrine, assuming that the doctrine stays in place. It probably would leave us in a context not unlike the context we're in when

weighing these same antitrust issues in a state situation; that is to say, state antitrust laws don't have a state action exemption as such. There are no federalism issues attached there.

But you do, with some regularity in facing cases brought under state antitrust laws, have to deal with conflicting issues: an insurance statute on the one hand that expressly permits rating bureaus; a state antitrust law on the other hand that prohibits price-fixing. Sometimes those conflicts are resolved on the face of the statute, but sometimes you have to fall back on principles of statutory construction, and whether the specific statute preempts the more general statute.

It seems to me that's the kind of context you'd be thrown into if you suddenly--

COMMISSIONER DELRAHIM: But any economic benefit from having the immunity? I'm a believer in Mr. Kempf's theory that a lot of these things go to the local level. Some of us have dealt with the political branches. These views on creating these new exemptions or regulatory bodies at the local level do not just spring into the minds of

legislators. They are special interest groups that understand the contours of the state action doctrine, and will go to get certain protection--maybe not in all cases, and I understand certain state regulators will oppose that view. That doesn't mean that it's not true--that they might oppose it.

If there is a larger economic policy which includes the antitrust laws, and the federal law said there is no such immunity, fine, you can go get your exemption at the local level, we're still going after you at the federal stage, or you'll still be liable for that. So it will discourage, I think, interest groups from going to the state level to getting an exemption--unless it's a compelling reason. At that stage, they can make that case to the Congress. If it's an important issue, and Congress has done as recently as just this past year, where they de-trebled certain activities in standard-setting organizations--and they can do that. But it's a national policy.

And I think that's something--again, I guess less of a question, more of a statement--something we can learn from the EU.

But is there a policy reason, benefiting the economy as a whole, to even keeping the state action doctrine, the state action immunities--on the books.

MR. CHRISTIE: Well, if you strongly believe in the utility of state regulation of certain industries--obviously, I gather, you don't, but there are people who do, then I think you would take strong issue with a proposal that basically would trump those, in favor of the perceived federal economic policy. The result--you're right--may well be to deter parties in the future from going to seek further state regulation, but you've still got the problem of what you're going to do in terms of all those laws on the books. And you're forcing people into an impossible position of inconsistent conduct--you know, inconsistent rules governing the same conduct.

COMMISSIONER DELRAHIM: I know the time is up, but, Madam Chair, if we could get the benefit of Mr. Langer and Ms. Ohlhausen's comments?

CHAIRPERSON GARZA: Yes, sure. If you have a short comment to make, go ahead.

MR. LANGER: When I heard your question, my

thought was: you would fundamentally alter the nature of our legal system. I mean, I was willing to go as far as to think about the market-participant exception because it is narrower, and there is a reason to balance the dormant Commerce Clause issue and the state action immunity issue under the antitrust laws.

I find it difficult to think in those terms --I am not trying not to answer your question, but you would have state governments just up in arms. As you know I was a state government antirust enforcer, and I witnessed some real competitive problems such as "*de jure* trade associations" at the state level. However, there is a practical side to implementation that may be quite difficult.

State action immunity is federalism-based. *Parker* is premised upon the view that Congress did not *intend* the law to apply to states--at least in certain capacities--although not as broadly as it has been interpreted in some cases.

Is there a countervailing public policy benefit, apart from competition principles? There are so many public policy benefits associated with

certain types of regulation, and the reasons for those regulations are not always simply the creation of legalized cartel arrangements, or some type of output restriction. It is an enormously complicated problem, and it would depend upon which regulatory body one were looking at. With regards to countervailing benefit, for example, if we rid ourselves of state action immunity, what would happen to departments of public utility control that regulate electric rates, or water, or the like. That involves a completely different analysis from those situations where you have occupational licensing boards that appear to be controlled by unions or by professions trying to retard competition in the marketplace.

So I do not think there is an overall answer to your question, in all candor.

MS. OHLHAUSEN: I was just going to say--I mean, it's obvious that the Constitution--you know, the recent *Granholm v. Heald* case has the value of having a national market. That's what the Commerce Clause is. And to the extent that you have things that are impeding the national market, like we talk

about the spillover effects, that's troubling.

I can't say--the report certainly doesn't cover it, and I haven't thought enough about it--about the effects of applying the antitrust laws to every form of state regulation.

CHAIRPERSON GARZA: Commissioner Cannon.

COMMISSIONER CANNON: Great. Thanks, Deb. And let me add my congratulations and appreciation to the panel for great statements. Real helpful.

You know, this just impresses me as a great example of an issue that the passage of time just doesn't really help a lot, in terms of figuring out a solution where everybody can get comfortable. And, Carlton, I enjoyed your recitation or discussion about the Local Government Act. And, as John knows, I like to say I was a high school senior or something, and not as old as I am. But that's not quite the case.

And, you know, it really wasn't the *City of Boulder* case that made that come to be. And if you recall--I know Jon will recall this--the League of Cities and a lot of other folks came to the Hill as soon as that case came out. But the response always

--well, you know, sure theoretically that's possible, but it won't happen. And there was legislation that was pending, and it was just not doing much.

And then a little town by the name of Gray's Lake, Illinois, suddenly found itself--you remember this, John--suddenly found itself facing about a $10 million antitrust liability over a zoning decision it made, and it had an annual budget of about $10 million. So, as you might guess, all of a sudden the theoretical became the concrete and the problematic.

And that bill--what eventual became the Local Government Antitrust Act, went from a meeting actually between Senator Thurmond and Senator Metzenbaum--and most people thought if you had a bill that had those two legislators on it, it was a pretty good chance of passing. But it went from a bill to signature by the President in--I want to say--maybe eight to nine weeks. It was not very long.

But--all that being said, to your point--and I think the point the whole panel is one way or the other making this morning--is that the reason it went and focused on the damage issue was because all these other issues we've been talking about this morning

were just too thorny to resolve. And that's really, I think, where we find ourselves this morning. And I'm listening about repealing the Act. But if I'm listening to the panel correctly, I believe a lot of folks are saying: gee, this is really too hard to wrestle with, so if we're going to do anything to address any perceived unfairness or inequity of private parties following the state commandments on this, the damage remedy is the only place to go.

Am I correct on that? Would you agree with that analysis?

MR. VARNER: Well, not entirely. I do agree, like a single-damage remedy would be a positive step, and I would definitely support that. I--

COMMISSIONER CANNON: And easier to do, frankly, than everything else we're talking about.

MR. VARNER: Yes. I do think if you leave the official action as interpreted by the courts unchanged that--as I mentioned, it's like two of 116 cases, and if they didn't grant an injunction I assume they wouldn't have granted damages, either. And I do think on "active supervision" I agree

there's not much you can do. But I do think, you know, a possible market-participant exception, something like that.

But the point in reading the legislative history--and I was just working from legislative history, largely--it's very clear. I mean they said --they looked at, well, let's have a clear articulation requirement. Well, *Midcal*'s too complicated. Then they said: what about a proprietary exception. And they said: no, that's too complicated.

And so it's helpful to have that explanation.

COMMISSIONER CANNON: That's what happened.

Bob, I thought, in your testimony the comment that most struck me was actually in the first paragraph, which essentially says: as a state AG, or a state antitrust enforcer--as you were so ably, so many years--basically you're in the exact right spot--an AG is, or NAAG is, for that matter--to really get their hands around it. But the reason is, is because you wear so many hats. You both are an antitrust enforcer--you counsel state

agencies about this sort of stuff. You probably opine on legislation--and then, of course, you defend state agencies when this gets challenged.

So how do you resolve all of that? How can the state or the state AGs be helpful in this debate?

MR. LANGER: One of the things that has occurred since then--in some states--is bifurcation or division of responsibility within the office, so that the same folks who might be antitrust prosecutors are not doing the defense work.

I actually found it valuable, maybe because I thought I could handle the responsibility--but the idea that I would be able to defend the constitutionality of a particular piece of legislation or regulation, and litigate affirmatively at the same time. But at DOJ, I assume there is a separation of those functions and you would never find someone in the Antitrust Division defending the constitutionality of a federal law. Bifurcation would be less likely at the state level because there are less resources at the state level.

I did not find it to be a problem, myself. But I do think it does raise an interesting problem

in terms of whether it should be the responsibility of the same person or department.

The last thing I will say is: the most interesting aspect of the *Ticor* case--and John knows this better than anyone--is although Connecticut's statutory scheme was involved, my office reviewed it and then determined it was sufficiently equivocal that we were not going to weigh in on the side of the FTC, even though I was the Chair of the NAAG Task Force at the time.

But Wisconsin did. And Wisconsin's own attorney general's office wrote the brief that was so important in convincing the Supreme Court that the FTC was right--there was insufficient active supervision. That was an important--a critically important--event, both in terms of the NAAG Task Force and in terms of our development of antitrust jurisprudence.

So I do think the same people can perform both functions, although perhaps one way to deal with the issue is to separate the functions out.

COMMISSIONER CANNON: A Chinese wall, or--how do you do that?

MR. LANGER: Well, you would not have the antitrust prosecutor also be the defense counsel. But that is easier said than done--it is not practical in many states.

COMMISSIONER CANNON: Thank you, Madam Chair.

CHAIRPERSON GARZA: Thank you.

Commissioner Warden?

COMMISSIONER WARDEN: Thank you. I come to this with the same *tabula rasa* that Sandy Litvack and Don Kempf do.

So I'm first going to ask a fact question. In *Ticor*, was the conduct that was challenged compelled by state law or permitted by state law?

MR. CHRISTIE: It was universally only permitted by state law. That's precisely why the FTC filed the case in the first place as a McCarran-Ferguson Act case, not as a state-action case.

COMMISSIONER WARDEN: Okay. My question's been answered. Thank you.

So, the theory of limiting liability here, legislatively, to single damages in such

cases--assuming any damages at all were allowed--is based not on the fact that conduct has been compelled, but on the fact that the actor who is sued can't know whether--it's too hard to know whether the state action test will be met, and it's unfair therefore; lack of notice. Is that correct, Mr. Langer?

MR. LANGER: It seems to me that there is both compulsion and there is permission; that is, there is compulsion in the sense that you cannot go forward with a tariff filing without seeking prior approval from the government. So that is the proverbial eye of the needle through which you must pass.

On the other hand, the joint tariff filing was not "required." That was only permitted.

COMMISSIONER WARDEN: That's all--okay. And nobody's been sued for following his own unilaterally filed tariff, has he?

MR. LANGER: No, no. My point is that the unfairness that I see is that in order to engage in a particular business, you need to seek prior government approval. It also impacts upon the *Noerr*

standard in terms of petitioning the government, whether you do it jointly or individually--unless there is some nefarious activity involved, or an absence of governmentally appropriate review of the private actor's submission.

COMMISSIONER WARDEN: Here is the problem I'm having: if conduct is genuinely compelled by a government and, legitimately under the Constitution or the interpretation of the antitrust laws, compelled, I don't see why there should be any second prong at all.

If you are actually required to do something, you shouldn't have any liability for doing it--assuming the legislative jurisdiction existed under *Parker*--and the Constitution. But if it's only permitted, then it seems to me that the only justification for reducing damages--in this one area --to single damages is lack of notice. That is, the private party can't know whether the government is doing its part in actively supervising.

Would you generally agree with that?

MR. CHRISTIE: Well, I would say it's twofold: he can't know, but it's also not his--it's

not his act to perform. He, she or it is not the regulator. It's the regulator who's going to be the state actor and commits state action if it occurs.

COMMISSIONER WARDEN: Why doesn't he take that risk if the conduct is only permitted, rather than compelled?

MR. CHRISTIE: Well, because, in many places, just as a practical reality, the state regulators encourage the private parties to collectively file their rate. It allows--from a state regulator's point of view, it allows them to concentrate their resources on one filing, as opposed to looking at 100 filings.

COMMISSIONER WARDEN: It's hard to see how that would happen unless there were active supervision. That's somebody who's actually thinking.

In *Ticor*, were the effects felt primarily in Connecticut, or were they nationwide?

MR. CHRISTIE: In *Ticor* the Commission challenged the rating bureaus as they existed in 13 states. After *Southern Motor Carriers* came along, and the state action doctrine--as I mentioned

earlier--became, at least as the FTC saw it, a genuine issue, the staff reconnoitered and came back and said, "We're going to drop our claims in all but"--I think five or six states.

When the smoke all cleared, and we got up into the Supreme Court, we were focused on four states: Wisconsin, Montana, Connecticut and Arizona. And the question was: did active supervision exist in those states?

COMMISSIONER WARDEN: Well, I asked a fact question which was not answered, I don't think.

Were the effects of the conduct in Connecticut felt in Connecticut, or nationwide?

MR. CHRISTIE: In Connecticut--because necessarily, these filings related only to the rates that are charged--or were proposed to be charged--in that particular state.

COMMISSIONER WARDEN: Thanks. That's all I was asking.

MR. CHRISTIE: Okay.

COMMISSIONER WARDEN: If I may, Madam Chairman, one final point. The reason for my questions is that if lack of notice, or inability to

conform to the law because it's so unclear is the grounds for reducing damages to single damages, it seems to me that has application in a lot of other areas--like the one we're also having hearings on today, exclusionary conduct, under Section 2.

Thank you.

CHAIRPERSON GARZA: Commissioner Jacobson?

COMMISSIONER JACOBSON: Thank you all for excellent written and oral presentations. I want to make an observation that if we're going to continue with the current regime, I do personally find the FTC Report quite persuasive.

But my question--and it's just one question --has to do with whether we should have a different regime, and it's along the lines that John Warden was suggesting.

What would be the impact--and I'd like each of you to speak to this--of a repeal of the state action doctrine post *Midcal* as we know it today, and enactment, instead, through prospective legislation, of a sovereign-compulsion-only defense that would be coincident with the sovereign-compulsion defense we have from foreign countries, in which the

encouragement by a foreign country of anticompetitive conduct is a yawn. It is not a defense under U.S. antitrust law. But true compulsion of the conduct is.

Would we have a better system? Would there be more or less anticompetitive conduct if we were to sort of throw out the *Midcal* line of cases and move into a sovereign-compulsion regime.

COMMISSIONER VALENTINE: Jon, can I asks question to clarify that, too? Do you mind? Which is, because I think one of the problems we're getting into is the interrelationship between state action and LGAA. And LGAA clearly requires conduct. State action, at times the scheme is "permitting it."

And so are we talking about combining all of this in your re-write and we would cover state and local government actors, and limit it to compulsion?

COMMISSIONER JACOBSON: Well, I would get rid of LGAA in its entirety--for a number of reasons --as well. But I'm not focusing on that. I'm just, taking *Parker v. Brown*, and modifying it so that it's a sovereign-compulsion-only defense--would that be a good or a bad thing?

And I'd like to go from my left to right, and start with Carl.

MR. VARNER: Yes, I'd answer that question: yes, that's the way we litigated in the '70s for a long time. There was a lot more clarity. You knew where you were going in terms of the scope of the doctrine, and the immunity is much less.

One thing I was thinking about as you said analogous to the Foreign Sovereign Immunities Act, which I think has a market-participant exception also. And I don't know how that would fit in. But, yes, I think a lot of the issues and the problems in the state action doctrine arise simply from the fact that there's no--that we lack compulsion, and went off on a road which seems to meander in a lot of different directions.

I'd be happy just to get back to real "clear articulation" and "affirmatively expressed." So if we adopt that approach I think that approach, I think that would add a lot of clarity to the situation, including the issue Mr. Warden brought up.

MS. OHLHAUSEN: I would say that I think that would certainly increase clarity and reduce the

likelihood of anticompetitive actions being taken *sub rosa*. Certainly, there would be other burdens on a state legislature to have to articulate these things much more clearly. And I don't know if I'm in the best position to weigh the costs and benefits of that.

MR. LANGER: It would certainly make Congress's job more difficult, because they would have many more people knocking on its door, I would imagine.

By the way, part of the answer goes to something that Jon had asked before. If it is sovereign compulsion, there is a whole body of law--*Fisher v. City of Berkeley*--where, unilateral compulsion does not even trigger a violation at all and you do not even reach the question of state action immunity. And so I assume you are talking about sovereign compulsion which would otherwise be collective action, not unilateral action by--

COMMISSIONER JACOBSON: If it doesn't violate the antitrust laws, then you don't have to worry about whether there's any kind of immunity. So I'm just talking about state compelled, either

unilateral or, more frequently, collective.

MR. LANGER: Yes--apart from the practical side of that, which I will not weigh in on because it seems to me that you folks are going to figure out what you are going to recommend, and I do not envy you on that--is as long as there is a clearly expressed state policy to displace competition that is affirmatively expressed, and there is no doubt that that is what the state government intends, I find it unnecessary to go to a compulsion standard as opposed to the current *Midcal* standard--although I agree, and I wrote in the article, and Mr. Carlton mentioned this in his comments, and certainly the FTC Report--that some of the cases have just come out incorrectly on those issues.

But if "clear articulation" truly is "clear articulation and affirmative expression," I would not opt for a compulsion standard.

MR. CHRISTIE: I'd be troubled by the approach, because I think it would have a negative impact on the ability--or the flexibility--that states might have in the future by way of regulating commerce within their state.

The most eloquent answer to your question, from my perspective, was given by Justice Powell in his *Southern Motor Carriers* opinion. One of the things he observed in rejecting the compulsion test was that, in the long run, if compulsion is the only answer, you may end up encouraging anticompetitive conduct because it would remove any option for private parties to act in a less anticompetitive manner by forcing them to the option that ultimately reduces competition.

COMMISSIONER JACOBSON: Thank you, Madam Chair.

CHAIRPERSON GARZA: Okay.

Well, one of the things about coming toward the end of the queue is that a lot of the issues that I had in front of my mind, having read your testimony and listened to you, have been addressed to some extent.

But the one issue that really occurred to me is the one that Debra raised initially, which is the spillover question. But when Debra raised it, the question was put to you about a 50 percent test--something close to what, I guess, the FTC had

recommended in terms of "overwhelming."

Well, my question is, you know, what concern, if any, should we have about state sovereignty when there's spillover? Do we need to have a 50-percent test? What would be the problem--or could you articulate something that really limited the doctrine to activity that was purely local--if there's any way to articulate that?

From my perspective, perhaps any spillover would be too much spillover. And the question I have is--and maybe this is for Debra to answer--you know, the 50 percent standard, does that come from appreciation that if we did have something more stringent that there would be an impingement on the ability of states legitimately to regulate within their borders?

Anybody want to address that?

[No response.]

CHAIRPERSON GARZA: Or was it just not clear?

MR. LANGER: No--it is very clear.

MR. VARNER: As I understand it, the whole basis--or one of the rationales for the doctrine is

simply that those who impose the restraint also pay the costs of the restraint. And so one of the policy reasons for the doctrine is that since the voters can replace them, that there is some sort of safeguard against anticompetitive activity. And that doesn't exist at all when the costs fall on the other people.

Now, in terms of domestic commerce, it strikes me that everything probably has some spillover--okay? Maybe I'm wrong, but I'm just thinking out loud here. And so you probably need some sort of level--and I thought, you know, 50 percent sounded reasonable. But I can't say that that is constitutionally required.

CHAIRPERSON GARZA: How would you apply it? A rule like that--whether it would 50 percent or 75 or 25? How would we determine?

MR. VARNER: I think you'd have to do it in terms of either units or dollars. I think you'd have to identify the product in question on which the restraint is imposed, and then make a determination about how much of that goes out of state?

CHAIRPERSON GARZA: Now, is there any analogy in other law? I don't know--I don't know

enough about the area to suggest examples.

MR. LANGER: Undue burden under the dormant Commerce Clause.

Yes--any number of cases. But I am not sure they are quantified in that way 5 percent, 10 percent, 20 percent or 100 percent.

But it seems to me there is this enormous body of law on the dormant Commerce Clause that would be valuable to look at in terms of what constitutes an undue burden, and maybe that can be transposed into a spillover analysis. I had not considered it until now, but perhaps you do not have to make it up, because it is already there.

CHAIRPERSON GARZA: Is there some category of local governmental regulation, or state governmental regulation, that people are concerned would be at risk if you had something close to "any spillover"--any measurable spillover would be too much?

MR. VARNER: I would mention one, I think, because--electricity.

CHAIRPERSON GARZA: Mm-hmm.

MR. VARNER: That's one that while it can be

local is also one that's an interstate commerce one--as opposed to, you know, garbage collection or something like that, which is clearly local. Electricity just strikes me as one, off the top of my head.

CHAIRPERSON GARZA: Any other ideas of how you could construct a spillover standard?

MR. LANGER: I defer to the FTC.

[Laughter.]

MS. OHLHAUSEN: Again, not that the report addresses this, but to the extent the *Granholm v. Heald* case--certainly, what it's weighing is what are the purported benefits to the state that require this kind of restriction on out of state competition.

So if that's something you're going to measure it against, what are the purported state benefits.

CHAIRPERSON GARZA: The other thing that I'd been thinking about was, assuming you had something that tried to address spillover, and maybe would take care of virtually everything, you'd still have some things that were purely--or close to purely--intrastate, and you'd still need something there.

And I actually had been thinking along the lines of compulsion.

But it seems to me the problem is compulsion may be coupled with no damages. But it seems to me the problem is getting the state or the governmental unit to really step up to the plate to what they're doing. And I think that's what the FTC is confirming, I suppose, when they use the "qualitative assessment," which I do find troubling. If you think that there is a state sovereignty issue, it seems to me that that doesn't sit very well with the qualitative test.

And my time is up. But I wonder whether there was any other way that folks thought it would be useful to encourage the states to really recognize that their activities were, in fact, displacing competition--not in terms of nullifying the federal antitrust law, but displacing competition for a regulatory scheme, that can really be called a regulatory scheme instead of simply allowing what, in essence, amounts to private restraints that are rubber-stamped by state legislatures.

MR. CHRISTIE: I don't know. I don't have

any easy suggestion as to how do you encourage that. There is a notion that I think runs through some of the courts' state action opinions--I'm thinking particularly of the *Omni* case--that suggest that this is really an issue that's best left to the states; that if states aren't, for one reason or another, fulfilling what the state's ambition ought to be about regulation, then it's for the states to come up with some remedy--the most obvious one being throw those regulators out and get some better regulators.

CHAIRPERSON GARZA: And what about--really quick, because I want to give Commission Carlton his-

MR. LANGER: I am sorry--my comment is this --some states have very vigorous advocacy programs, comparable to the FTC's or DOJ's, in which state attorneys general advocate before regulatory bodies not to be captives, and not to be anticompetitive. The question is whether that could be institutionalized on a broader basis. That would be invaluable. Because then it is not a question of the federal government dictating to the states, but rather it is a question of a state simply taking care of its own business.

CHAIRPERSON GARZA: Commissioner Carlton?

COMMISSIONER CARLTON: Thank you.

I'm in that camp of not having much background in this. In fact, I'm humbled--my distinguished colleagues have said they're ignorant in some of these areas. I'm less than that, since I'm an economist. So if my questions seem basic, it's really to help me better understand these issues. And I apologize.

But as I understand it, cartelizing activity within a state affects people out of the state and in the state. The concern about spillovers is that the cartelizing activity acts just like a tax, and it's a tax on people outside the state. And therefore, it violates the Commerce Clause--or could be thought to, and therefore we shouldn't allow it, and that's why we should have a spillover rule.

And that's what I understood--for example, you've been talking about the 50-percent rule. Whether it should be 50 percent or an absolute dollar amount strikes me as something worthy of further consideration.

But I also assume that everyone recognizes

that local regulations--local minimum wages, local environmental conditions--also have spillover effects in that same industry. And therefore what we must be saying--I assume, when you're worried about a spillover effect--is that the spillovers we're going to focus on are the result of activities that are purely cartelizing. And that if the objective of the regulations is simply to raise price, we're not going to allow that to be exported out of the state. So as Mr. Christie was saying, there are a lot of reasons why states regulate. Not all have to do with price. We're focused on price. And those also will have spillovers.

And I assume what you're saying is: if we're going to have a spillover effect, or an antitrust Commission, let's just focus on the cartelizing activities. We don't want to open the door and say "every local regulation that might have a spillover in another state is something this Commission should deal with.

Is that correct, Ms. Ohlhausen.

MS. OHLHAUSEN: Yes. There would still have to be an underlying antitrust violation that would

have to be proved in the absence of the immunity.

COMMISSIONER CARLTON: That I understand, because this is an antitrust case. But the logic would suggest going to every regulation--but I assume that's not what you're necessarily suggesting.

MS. OHLHAUSEN: That's correct.

COMMISSIONER CARLTON: Okay.

Now, let's focus on people in the state. The logic, as I understand it is: you have local politicians, you have local regulators. If it's purely a local effect--if citizens, if they're getting taken advantage of, they can put people out of office and change the regulation.

Now, my understanding is--and this follows a question as to whether Congress has the constitutional right to preempt state legislatures--my understanding is that there has been such legislation occasionally. And this is more informational for my part.

I thought, for example, on trucking regulation there's a law--a federal law--I thought it was passed in the early '90s--that forbids the states from having regulatory bodies that regulate

intrastate trucking--with certain exceptions: moving and things like that.

Does that square with anyone's--am I just off base on that?

MR. CHRISTIE: I don't really know the answer, Dennis, to the specific question--except I do believe that there remain in life state motor carrier regulation. In fact, you know, it was that regulation that was at issue in the six cases that Maureen talked about that the FTC has recently launched for state action purposes.

COMMISSIONER CARLTON: Okay. Well, I can check that. But it did seem to me there are some situations in which Congress overrules the states' rights to make such local regulations.

That really focuses me on a problem that I think Don Kempf raised, and that is: I have the impression that a lot of local regulations, you have to be fearful that the regulatory body has been captured, and therefore consumers are being taken advantage of. And the premise that Mr. Varner stated, which is if the voters don't like what's going on they can throw out the politicians--that

premise may not be accurate. And if it's not accurate, the question is: what should we do? Should we just give up under the state action doctrine? Or is there something else?

And, John, what I'd like to ask you about your view on is: do you think "active supervision" could be interpreted to mean that the state regulators must conduct an evaluation of the consequences of their action? Perhaps asking the FTC to comment? And, in particular, if there were a state regulation that raises the price of a product in comparison to other comparable states where the price is much lower, that would be a requirement. And that would seem to help on transparency, making evident what the politicians are doing, and also might help the FTC make the world better.

MR. CHRISTIE: Well, at least as I read the *Ticor* opinion--and I made it clear, I think, today in my earlier statement that I do think there are a lot of ambiguities in it--but at least as I read it, the Court wasn't looking for a record that guaranteed that the regulators had reached the right result for its citizens, the right way. Instead, Justice

Kennedy was just looking for sufficient evidence that the regulators had been substantially involved; that their participation had been significant enough so that basically you could fairly say they came to embrace the result--a quantitative kind of assessment that doesn't look at how good it was for the citizens, or how well--

COMMISSIONER CARLTON: That I understand. I guess my question is would it be an improvement if there were a requirement that you could overrule some state regulation if it turned out that consumers either were being taken advantage of, or that as part of the evaluation process there was no recognition of the effect on consumers.

MR. CHRISTIE: In a perfect world--it would be hard to say anything other than "yes" to your question. But the question we're grappling with here today is whether it should be the federal courts or the federal antitrust agencies that should be making that evaluation and reaching that result if necessary.

You know, I think the answer to that is no. The issues that you're raising, quite properly, are

issues that really should be faced up in the states themselves. And one would hope there would be some way in which that could happen. But I think it's a state problem, or a state issue, rather than a federal antitrust issue.

COMMISSIONER CARLTON: Okay--thank you.

CHAIRPERSON GARZA: All right.

Well, I want to thank you very much, panelists, for giving us your time and your thoughtful comments. As you can tell from the comments of the Commissioners, we obviously took a lot from it. And a lot of us aren't experts in this area and hadn't really thought about it, and you certainly have helped us to do that, and helped us to appreciate the complexity of the issues involved.

And I thank you again very much.

MR. HEIMERT: The Commission will take a break for lunch and we'll reconvene at 12:45 for the hearing on exclusionary conduct.

[Whereupon, at 11:35 a.m. the hearing concluded.]